
OPINION OF THE PUBLIC ACCESS COUNSELOR

CHRISTIAN SHECKLER,
Complainant,

v.

ELKHART SUPERIOR AND CIRCUIT COURT,
Respondent.

Formal Complaint No.
18-FC-5

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to the formal complaint alleging the Elkhart Superior and Circuit Court (“Court”) violated the Access to Public Records Act¹ (“APRA”). The Court has responded via the Hon. Judge Teresa L. Cataldo. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on January 12, 2017.

¹ Ind. Code §§ 5-14-3-1 to -10

BACKGROUND

Christian Sheckler (“Complainant”), a reporter for the South Bend Tribune, filed a formal complaint alleging the Court violated the APRA by wrongfully denying copies of court records.

On October 16, 2017, the Complainant filed a public records request to the Court seeking inspection or copying of three separately identified cases. The request was significantly broad and sought the entirety of the files in those cases, including exhibits. The request was partially granted via Court orders explaining that some of the materials may be withheld for confidentiality and discretionary reasons. The Court’s response to the formal complaint presents those arguments as well, citing various subsections of Administrative Rule 9 as well as the Access to Public Records Act.

ANALYSIS

APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” Ind. Code § 5-14-3-1. The Elkhart Superior and Circuit Court is a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2(n). Therefore, unless an exception applies, any person has the right to inspect and copy the Courts’ public records during regular business hours. Ind. Code § 5-14-3-3(a). A public agency is required to make a response to a written request that has been mailed within seven (7) days after it is received. Ind. Code § 5-14-3-9(c).

The positions of both parties are appreciated and well-received. Instead of a restatement of the complicated factual and procedural details, it may be more beneficial to give a broader perspective of the interplay between the judiciary’s administrative rules and the Access to Public Records Act – both of which refer (and defer) to each other throughout their respective provisions.

The Office of the Public Access Counselor is an executive branch agency although the legislature has given this Office the jurisdiction to address “any state statute or rule governing access to...public records.” See Ind. Code § 5-14-4-3(3). The judiciary is subject to the Access to Public Records Act pursuant to Ind. Code § 5-14-3-2(p)(1). That said, this Office is careful to recognize the separation of powers enumerated in the Indiana Constitution and recognizes the sovereignty of the judiciary which is mutually exclusive from the executive branch of State Government.

This Office regularly consults with the State Court Administration on matters involving the judiciary and works to create a symbiotic relationship between all government units, to the extent it is able. Nevertheless, this Office interprets the Access to Public Records Act to consider complaints filed against the judiciary to be justiciable and therefore provides guidance on both the APRA and Administrative Rule 9.

To begin, it is important to note the difference between *confidential* records and *discretionary* records as it pertains to court records. When a statute or rule declares a specific piece of information contained in a public record to be confidential, it is excluded from general public access. Ind. Code § 5-14-3-4(a) gives several examples and subsection (3) references other statutes or rules which may designate a record to be confidential. Administrative Rule 9(G) expounds upon this and enumerates several categories of records that shall not be made available for public inspection. This confidentiality extends beyond the life of the adjudication. There are procedural safeguards for the submission of these kinds of information by the parties to ensure confidentiality and privacy.

Contrast confidentiality with the concept of discretionary release. When a statute or rule gives an agency the discretion to withhold or release a document, it usually means the subject matter rises to a level of sensitivity above and beyond a normal public record, but stops short of being *de facto* confidential.

As an illustration, take investigatory records of law enforcement agencies as an example. Those records are released at the discretion of law enforcement pursuant to Ind.

Code § 5-14-3-3(b)(1). They are not confidential *per se*, but may contain information which, if released to the public, could compromise an investigation or prosecution. Typically when a sensitive discretionary record is submitted to the Court it becomes subject to public inspection. If a party wants to exclude the record from public access, it must move the court to do so. This process involves a hearing which is regulated by Ind. Code § 5-14-3-5.5 and referenced in Administrative Rule 9(G)(4) as cases of *extraordinary circumstance*. The exclusion, or sealing, of the record is temporary and should only exclude records by the least restrictive means.

If I am interpreting the complaint correctly, the core of the issue is whether a Court has the discretion to *sua sponte* exercise discretion to withhold non-confidential records without following the procedures set forth in Ind. Code § 5-14-3-5.5 and Administrative Rule 9(G)(4). Administrative Rule 9(G)(6)(c) only allows exclusion of court records from access without notice and a hearing those specifically declared *confidential*. Therefore those which are merely *discretionary* cannot be withheld from public inspection without a 9(G)(4) hearing.

The Court cited approximately eleven categories of records in its partial denial, but not all of those records are confidential by law. For example, the entirety of an autopsy report is not excluded from access. While video and photographs are, certain information in a report under Ind. Code § 36-2-14-18(a) must be created by a coroner and unequivocally made available (names, ages, addresses, cause and manner of death, etc.). Additionally, witness, victim and juror names are not confidential (unless otherwise stated by

law, i.e. juveniles or sex crime victims), although certain identifying information such as addresses would not be subject to inspection. Finally, briefs submitted to a court are not confidential work product or deliberative material once they are submitted as a pleading and become part of the record. The attorney waives such discretion when it is submitted to the Court and presumably the opposing party.

I do not believe the Administrative Rules or subsection (b)(4) et al. of the APRA were intended to transfer discretion of this kind to a Court. Make no mistake, a judge has broad authority and discretion to run a courtroom in an orderly manner and administer justice in a way that balances public access with any privacy interests. However, the Supreme Court is clear through the promulgation of its administrative rules (and their commentary) that the presumption is for disclosure. Therefore those records specifically declared confidential may be excluded without a petition or hearing, however, no other record may be excluded by the Court unless requested by a party and notice and a hearing has been provided. As to those records which have not been explicitly declared *confidential* by statute or rule, I encourage the Court to revisit its policies and procedures to ensure appropriate access to its records and direct the Clerk's Office to respond to the Complainant accordingly.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Elkhart Courts have not acted in compliance with the Access to Public Records Act by withholding certain records upon request.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor